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Book Reviews

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BOOK REVIEWS

BRIEFING AND ARGUING FEDERAL APPEALS. Frederick B. Wiener.
Washington: Bureau of National Affairs, 1961, Pp. 506. \$11.75.

The *enfant terrible* of the Supreme Court bar has done it again. Frederick Bernays ("Fritz") Wiener, in "Briefing and Arguing Federal Appeals", has turned out a revised edition of his prior, excellent work, "Effective Appellate Advocacy,"¹ which youthful striplings in the appellate courts who knew enough to consult the best invariably turned to in a pinch. His new book strikes the reader like a gentle breeze, and not like the tornado which is sometimes Wiener's style.²

I was much interested in getting to read this revision when it first came out. In doing my earliest appellate work, I so often consulted the previous edition that I could almost say I was weaned on Wiener. The present volume's greatest merit is its retention, and enlargement on, the "quotable quotes," such as "the Government lawyer who will actually wear the striped pants and emit the sound effects"³ as a description of lawyers in the Solicitor-General's office, the "waggish fellow, seeing the report of a forfeiture case entitled *United States v. One Ford Automobile*, commented that this caption reflected a most unequal contest,"⁴ etc.⁵

The author has also updated and expanded his citation of relevant case materials. His footnote material is newer, and often more illustrative, of the points he is making. And, most important, he has retained the core of his prior work, the excellent, how-to-do-it and how-not-to-do-it chapters on appeals. These penetrating observations are timeless.

Lawyers will disagree, and I find myself dissenting from some of his judgments. For example, he rightly notes the persuasive power of leading law review articles,⁶ but tends to downgrade student notes.⁷ A really good student note, as distinguished from the run-of-the-mill, hackneyed filler material put out by most editors, can be of material assistance. Only recently, I got the New York Court of Appeals to reverse over 35 years' of unbroken lower court cases, including one of the leading ones, which was written by a sitting member of the court when still on a lower court, with

¹ (New York, 1950).

² Wiener, Book Review, 51 Nw. U. L. Rev. 155 (1956).

³ p. 135. ⁴ p. 179. ⁵ p. 301.

⁶ p. 199. See, for a late example, *Kasey v. Goodwyn*, 291 F. 2d 174, 178 (4th Cir., 1961).

⁷ p. 198.

the aid of several highly persuasive student comments.⁸ The majority opinion there cited nothing but law review material, a rare illustration of how effective helpful law review material can sometimes be, even when it is anonymous or written by undergraduates.

I also think that the book slides over, much too lightly, the uses that a large mass of lower court cases can be put to. In *N.L.R.B. v. Weyerhaeuser Company*,⁹ my original draft of the Labor Board's brief contained a list of all board cases which had sustained the type of separate bargaining unit there involved. This was cut out at higher echelons to keep the brief compact, but fortunately the amicus curiae reproduced the list. The fact that it was picked up in the court's opinion¹⁰ shows that this cumulation was of persuasive value.

Finally, I disagree with Wiener's assertion that "the real test of whether a brief has been effective . . . is whether it wins the appeal."¹¹ Wiener himself admits that some appeals are just beyond the powers of the most persuasive counsel, either because the record is hopeless or because the judges have different ideas from those of the lawyer.¹² (Even John W. Davis could not persuade a single Supreme Court justice to sustain Southern segregation laws.¹³) Indeed, the really best efforts of good counsel are found in the hard or hopeless cases; the incentive to perfection in an open-and-shut case is rather minimal. I myself cherish more the references by the Third Circuit to me as "capable" and "candid" in its recent opinion in *Gordon v. Willingham*,¹⁴ holding against my contentions, than any cases won as an anonymous Labor Board employee.

The present edition also retains all of Wiener's previously expressed prejudices. This is particularly evident in the section on citations. For example, he castigates as a "perverse innovation" the recently developed practice of citing early United States Supreme Court reports by numerical volume number as well as reporter,¹⁵ although Shepard's Citator has done this for some years. I am all in favor of this practice. Many has been the time when the particular volume of Supreme Court reports I wanted was off the shelf in a law library, and I have had to use the Lawyers' Edition. For this purpose, I find it annoying to try to collate in my mind what U. S. volume 22 Wallace is, for example. Lawyers may safely

⁸ *Association for the Preservation of Freedom of Choice, Inc. v. Shapiro*, 9 N. Y. 2d 376, 214 N. Y. S. 2d 388 (1961).

⁹ 276 F. 2d 865 (7th Cir., 1960).

¹⁰ *Id.*, at p. 870-1. ¹¹ p. 125. ¹² p. 392-4.

¹³ *Brown v. Board of Education*, 347 U. S. 483 (1954).

¹⁴ 294 F. 2d 575, 576 (3rd Cir., 1961).

¹⁵ p. 228.

ignore this last dying gasp of the old fogies of the profession. As for Wiener's use of Mr. Justice Frankfurter's insistence on the old style in a Harvard Law Review article, my short answer is that two hot dogs don't make a whole delicatessen.

Another example of the same thing is Wiener's advocacy of citing cases in Federal Cases by the original reporter.¹⁶ On the very next page, he suggests that the old official CCA reports not be cited as a parallel citation to Federal Reports since "that series ceased publication in 1919 or thereabouts, most libraries now do not have it, and consequently citations thereto are not only useless but burdensome besides,"¹⁷ all of which applies *a fortiori* to the pre-1880 reports of lower federal courts. His reasoning for the difference is two-fold, first, that parallel citations are used in English Reprints, and second, a "feeling for the formative years when the Justices of the Supreme Court rode circuit." The use of parallel citations are not analogous in English Reprints, because the same opinion may be reported there in several different places with varying degrees of accuracy,¹⁸ and the parallel reference tells you which reporter is being used, whereas in Federal Cases the case is reported only once, regardless of the number of sources. As for his other reason, most of the opinions in Federal Cases are decisions of district or circuit court judges. In addition, his sentimental journey on circuit with our early Supreme Court justices in the days of yore leaves me cold. They deserve no special tribute, especially in this form. I can state that if the President desires to appoint me a Supreme Court Justice, I will willingly ride circuit in all 50 states, or even in the Himalayas, *a la* Mr. Justice Douglas.

As for the innovations, the first, of which I most emphatically disapprove, is the chapter on "New Counsel on Appeal,"¹⁹ not only because it is wholly foreign to the professed subject of the book, and hence as irrelevant as it could be, but also because after spending 379 pages telling John Q. Attorney how to brief and argue cases, the author now tells him to throw the book away and get an appellate specialist.²⁰ This certainly has a depressant effect. In addition, when I first read this chapter, in the American Bar Association Journal,²¹ my initial visceral reaction was that this had the odor of a thinly-veiled bid for legal business.

¹⁶ p. 231.

¹⁷ p. 232.

¹⁸ See, for example, *City of London v. Vanacre*, 1 Ld. Raym. 496, 91 Eng. Rep. 1231; 12 Mod. 270, 88 Eng. Rep. 1314; *Carth.* 480, 90 Eng. Rep. 876; *Holt K. B.* 431, 90 Eng. Rep. 1137; 1 Salk. 142, 91 Eng. Rep. 1323 (1700).

¹⁹ p. 380 et seq.

²⁰ Especially, see pp. 387-8, 390-2.

²¹ Wiener, "Specialized Appellate Counsel: His Importance, Necessity, and Usefulness," 45 A. B. A. J. 677 (1959).

Acquitting Wiener in advance of any such motive, I nevertheless feel on re-reading that the chapter still retains the same flavor.

Most of the other innovations are observations too highly personalized to belong in a book of this type. The revisions, following the style of 18th century treatises, might well have been entitled: "The Life and Legal Battles of Colonel Frederick Bernays Wiener, JAGC-USAR, With Numerous Maps of his Legal Campaigns, his Personal Observations on Strategy, Tactical Triumphs, Personal Likes and Pet Peeves, etc., etc." Indeed, I wonder whether the Federal Trade Commission ought not to look into this matter as a possible case of misleading advertising.

For example, Wiener's expressions of bitterness at courts,²² or of exaltation at winning an important case,²³ should have been firmly removed. I was likewise highly irritated to find in a volume of this kind a sideswipe at the revisers of the Judicial Code which was not even supported by a single authority,²⁴ and if Wiener has difficulty in keeping track of his writing I suggest that he establish a card index rather than use each new volume as a place to cumulate all prior writings.²⁵

Moreover, the author uses much-too-much military law material for the average practitioner. I myself enjoyed the military law minutiae, and was easily able to follow it, for I have had for some years now a deep interest in this subject, and relish the details about how *Reid v. Covert*²⁶ was ultimately won. However, for a lawyer whose only connection with the service was the 4-F he sought and received from his draft board, this material is difficult to follow. What the author should have done is either to have enlarged his practice or used someone else's briefs.

The short of the matter is that every lawyer out of school and in practice for more than two years has his own store of anecdotes, preferences, and peeves, and becomes impatient at listening to too many of someone else's. Accordingly, however perceptive a critic the author's wife may be,²⁷ she is unlikely to make her criticisms stick as to this. I would therefore recommend that if another edition is run, Wiener send the manuscript to an independent lawyer for reading. In that way, the useful innovations of the new edition can be kept without having the view of the highly perceptive and relevant chapters marred by being encased in a clutter of personal trivia hauled down from the author's mental attic for public display.

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²² pp. 430, 444. ²³ pp. 441-2. ²⁴ p. 369, n. 19a.

²⁵ p. 239, n. 101. ²⁶ 354 U. S. 1 (1957).

²⁷ See flyleaf, acknowledgements, and p. 300.